Supreme Court, U.S.
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

Jodie Timothy Packer, Petitioner

v.

United States of America

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Pro-Se

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89 pp

QUESTIONS PRESENTED FOR REVIEW

The petitioner, JODIE TIMOTHY PACKER, in making his decision to plead guilty, relied on 1) dispositive Fifth Circuit precedent and the requirement that the Courts adhere to their procedural rules and follow their precedent, 2) the Court's and the prosecution's assertions on the record that he would be sentenced pursuant to the United States Sentencing Guidelines as published, and 3) the Court's the prosecution's and his attorney's knowledge of the law and what conduct constituted a crime. These points upon which Packer reasonably relied, resulted in his detrimental reliance and a violation of Due Process when it occasioned that the Courts 1) did not follow dispositive Circuit precedent, 2) did not sentence Packer pursuant to the Guidelines, and 3) allowed Packer to plead guilty to an offense which, as a matter of law, he was not guilty, resulting in Packer entering an involuntary and unknowing guilty plea. The following questions are presented in this petition.

1. Whether the Due Process Clause, Rule 47, Federal rules of Appellate Procedure, Fifth Circuit Rule 47.5.3 and Fifth Circuit rules made through adjudication making Circuit precedent binding, require the Courts to adhere to dispositive Supreme Court and Circuit precedents and their own procedural rules upon which an accused has reasonably relied in pleading guilty and whether the district court's sentence and the Fifth Circuit's opinion were "ultra vires" acts and therefore prima facie void when entered?

2. Whether an accused's guilty plea is rendered involuntary when the District Court imposes a sentence contrary to the Court's and the government's commitments upon which he detrimentally relied?

3. Whether a constitutionally valid plea of guilty is a mandatory predicate to an enforceable waiver of appeal rights?

4. Whether the judicial review of United States Sentencing Guideline commentary must be conducted in light of the substantial deference standard of review, the narrow inquiry of sufficient reasonability and precedents set forth in ***Stinson v. United States***, 123 L.Ed.2d 123 (1993).

PARTIES TO THE PROCEEDINGS PER RULE 14.1(b)

The parties to the proceeding in the court whose judgment is sought to be reviewed are named in the caption of the case before this Honorable Court and are joined by the United States Sentencing Commission.

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PETITION FOR A WRIT OF CERTIORARI

Comes now **JODIE TIMOTHY PACKER**, pro-se, a federal prisoner incarcerated at Federal Medical Center, Fort Worth, Texas, interposing ***Haines v. Kerner***, 404 U.S. 519, 520 (per curiam) (1972) and ***Estelle v. Gamble***, 429 U.S. 97, 106 (1976), respectfully prays that a writ of certiorari issue to review the order and judgment entered by the United States Court of Appeals for the Fifth Circuit on November 22, 1995.

OPINION BELOW

The Fifth Circuit affirmed the sentence and conviction of the District Court in a published order styled ***United States of America v. Jodie Timothy Packer***, 70 F.3d 357. A coy of the order is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The order and judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 22, 1995. App. A. **PACKER's** Motion for Reconsideration was denied on January 3, 1996. App. B. This petition is filed within ninety (90) days after dismissal of the Motion for Reconsideration. See Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. Section 1254(1) to review the judgment through certiorari.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

1. Fifth Amendment to the United States Constitution, App., p 3a

2. Title 18 U.S.C. Section 3146, App, p. 13a

3. United States Sentencing Guidelines Sections, p.3a

a. Guideline Section 2J1.6 n.3, App., p.5a
b. Guideline Section 3C1.1 n.6, App.,
c. Guideline Section 3Dl.l, App., pgs. 15a, 18a
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e. and 34a
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1. Question 67, App., p.17a
2. Question 119, App., p.18a

4. Federal rules of Appellate Procedure, Rule 47, App., p.18a

5. Fifth Circuit Court of Appeals, Rule 47.5.3, App., 19a

STATEMENT

Petitioner, **JODIE TIMOTHY PACKER,** was sentenced to consecutive terms of imprisonment of 27 months and 16 months. The basis for federal jurisdiction in the court of first instance was 18 U.S.C. Section 3231.

Pursuant to a plea agreement, **PACKER** pled guilty to Concealing Person from Arrest, Conspiracy to Violate Passport Fraud, Use of Fraudulent Social Security Number, Mail Fraud (Two [2] Counts), Passport Fraud, Failure to Appear and Structuring Financial Transactions to Evade Reporting Requirements (Two [2] Counts). As part of the plea agreement, the government specified that **PACKER** would be sentenced "in accordance with the ***Sentencing Guidelines and Policy Statements***". App. D. The District Court, during the plea colloquy, told **PACKER** "you're going to be sentenced pursuant to the sentencing guidelines". App. E. **PACKER** waived the right to appeal any issues except issues related to the application of the Sentencing Guidelines or the basis for any upward departure the Court might impose. App. C.

PACKER's sentence was not imposed in accordance with or pursuant to the United States Sentencing Guidelines. Guidelines Section 2J1.6 n.3 and Section 3Cl.l n.6 mandate grouping of all of the underlying counts of conviction with the failure to appear count in one group of closely related counts under Section 3D1.2(c). Guideline Section 2J1.6 n.3 and Section 3C1.1 n.6 state and provide clear examples of how to sentence a defendant with a count of failure to appear as one of the counts of conviction.

The District Court sentenced **PACKER** to the maximum under the guidelines for the underlying offenses and the maximum under the guidelines for the failure to appear count

to be served consecutively. This sentence was not in conformity with the clear, unambiguous language of the Sentencing Guidelines, directly contrary to the commitments made to **PACKER** by the Court, the prosecutor and his own counsel and in conflict with not only, Fifth Circuit precedent, but also every other Circuit Court of Appeals which had ruled on the issue. See ***U.S. v. Agoro***, 996 F.2d 1288 (1st Cir. 1993); ***U.S. v. Pardo***, 25 F.3d 1187 (3rd Cir. 1994); ***U.S. v. Mitchell***, 9F.3d 1547 (5th Cir. 1993) [Table], App. E; ***U.S. v. Lechuga***, 975 F.2d 397 (7th Cir. 1992); ***U.S. v. Sarna***, 28 F.3d 657 (7th Cir. 1994); ***U.S. v. Jernigan***, 60 F.3d 562 (9th Cir. 1995); ***U.S. v. Lacey***, 969 F.2d 926 (10th Cir. 1992).

PACKER also pled guilty to two (2) counts of Structuring Financial Transactions to Evade Reporting Requirement 31 U.S.C. Section 5324. Prior to or during the plea colloquy, neither the Court, nor the government or his attorneys informed **PACKER** about the additional element of the offense of structuring established seven (7) months earlier by the Supreme Court in ***Ratzlaf v. United States***, 501 U.S. _____ 1994) (decided January 11, 1994).

Ratzlaf, held that "To establish that a defendant 'willfully violat[ed]' the anti-structuring law, the government must prove that the defendant acted with knowledge that this conduct was unlawful." ***Ratzlaf***, 126 L.Ed. 615, 620. "The government must now also prove that a person, when structuring a currency transaction, knew that his conduct was unlawful." (emphasis added) ***U.S. v. Oreira***, 29 F.3d 185, 188 (5th Cir. 1994); "The [Supreme} Court examined the structuring statute and squarely held that it required proof of specific intent to violate the law." ***U.S. v. Garza***, 42 F.3d 251, 253, (5th Cir. 1994).

PACKER appealed, contending 1) that the District Court had imposed a sentence not in accordance with the guidelines, 2) that his plea as to the structuring offenses was involuntary, 3) the Court could not have established a factual basis for the plea and 4) had he have known that his conduct of structuring financial transactions did not constitute a crime he would not have pled guilty.

The Fifth Circuit affirmed **PACKER's** conviction and sentence stating 1) there was a conflict between the commentary to Section 2J1.6 n.3 and 18 U.S.C. Section 3146(b)(2) and because **PACKER** had waived his rights to appeal any finding of guilt the Court would not consider whether the guilty plea was entered knowingly and voluntarily. **PACKER** moved for reconsideration asserting the conflict between **PACKER's** decision and its own Circuit precedent and the conflict with every other Circuit which had decided the issue. The Fifth Circuit denied reconsideration. App. B.

REASONS FOR GRANTING THE WRIT

1. **PACKER** was denied due process of law by his reasonable and detrimental reliance on the Fifth Circuit's rules of mandatory adherence to Supreme Court and Fifth Circuit precedents. The Fifth Circuit's decision and the District Court's sentence are in conflict with not only their own Circuit precedent but also with every other court of appeals which has decided the issue of sentencing in accordance with U.S.S.G. Section 2J1.6 n.3 and Section 3Cl.l n.6 including the First, Third, Seventh, Ninth and Tenth.

2. **PACKER** was denied due process of law by the District Court not sentencing him in accordance with the United

States Sentencing Guidelines, a commitment made to him by the Court, the government and his attorneys and upon which he reasonably relied in his decision to plead guilty. This action was in conflict with the Supreme Court's precedents established in ***Brady v. United States***, 397 U.S. 742 (1970) and ***Santobello v. New York***, 404 U.S. 257 (1971).

3. **PACKER** was factually innocent of the offense for which he unknowingly and involuntarily pled guilty. The District Court's violation of **PACKER'S** due process rights by not informing him of the elements of the offense which must be proven to convict him, which resulted in **PACKER** pleading guilty to an offense where his conduct did not constitute a crime, rendered the conviction a complete miscarriage of justice resulting in an unconstitutional loss of liberty and is inconsistent with the rudimentary demands of fair procedure.

4. A standard of review established by the Supreme Court is the law of the land and is binding precedent on the courts below. This Court established the standard of review to be applied to the United States Sentencing Commission's interpretation of a statute, in the form of guideline commentary, in ***Stinson v. United States***, 508 U.S. _____ (1993). The Fifth Circuit, in invalidating a guideline commentary in the **PACKER** decision, not only failed to apply this binding precedent but also the record does not reflect that any standard of review was applied. Therefore, this Court should grant this Writ and remand this case back to the Fifth Circuit with instructions to follow the standard of review set forth in ***Stinson***, supra.

I. Adherence to Dispositive Supreme Court and Circuit Precedent is Mandatory

Implicitly inherent in a defendant pleading guilty is the defendant's reasonable reliance on the Courts following their own procedural rules, both explicit and implied, and adhering to dispositive Supreme Court and Circuit precedent. When it occasions that the Courts have not adhered to this firm rule of adherence to precedent, to the detriment of the defendant, the Due Process Clause is implicated.

"As its very terms make manifest, the Due Process Clause is first and foremost a guarantor of process. It embodies a commitment to procedural regularity independent of result" ***United States v. Caceres***, 440 U.S. 741, 764 (1979) (Mr. Justice Marshall and Mr. Justice Brennan dissenting). It is this due process commitment to procedural regularity to which the Courts purport to adhere and upon which the individuals before the Courts have a due process right to be able to reasonably rely.

In ***Raley v. Ohio***, 360 U. S. 423 (1959), the Supreme Court held that the Due Process Clause prevented the conviction of persons who had relied upon assurances "either express of implied". (emphasis added); ***Bram v. United States***, 168 U.S. 532 (1897), held that the admissibility of a confession depended upon whether it was compelled or "obtained by direct or implied promises". (emphasis added)

A defendant's counsel must assist his client in deciding whether to plead guilty. "He must actually and substantially assist his client in deciding whether to plead guilty. It is his job to provide the accused an understanding of the law in relation to the facts." ***Herring v. Estelle***, 491 F.2d 125, 128 (5th Cir. 1974). One of the most crucial ways counsel

determines the law, is through the Courts' interpretation of the law, presidential case law. It is with this knowledge of precedent, that counsel advises the defendant on pleading guilty and how he may expect to be sentenced according to relevant precedent.

The Supreme Court has consistently affirmed its views regarding adherence to precedent in stating "Stare decisis is the preferred course because it promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions and contributes to the actual and perceived integrity or the judicial process." ***Payne v. Tennessee***, 501 U.S. 808 (1991). "The doctrine of stare decisis is of the fundamental importance to the rule of law, [it] promotes stability, predictability and respect for judicial authority." ***Hilton v. South Caroline Pub. R.R. Comm'n***, 502 U.S. 197 (1991); "[A] respect for precedent is, by definition, indispensable [to the rule of law]" ***Planned Parenthood v. Casey***, 505 U.S. _____ (1992); "[T]he doctrine [of stare decisis] carries such persuasive force that we have always required a departure from precedent to be supported by some special justification." ***Arizona v. Rumsey***, 467 U.S. 203, 212 (1984); "[U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this [Supreme] Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." ***Hutto v. Davis***, 454 U.S. 370, 375 (1982). The Fifth Circuit has continually reiterated the binding nature of Circuit precedent in stating "Although our own analysis pulls us elsewhere … consistency is duty and an essential part of the juridical process…" ***U.S. v. Hernandez***, 580 F.2d 188, 191 (5th Cir. 1978); "One panel of this Court cannot disregard the precedent set by a prior panel, even though it conceives error in the precedent." ***Davis v. Estelle***, 529 F.2d 437, 441 (5th Cir. 1976).

Chief Judge Politz, in writing the opinions for the Court has stated "Uniformity and stability require that each panel of our Court be bound by the decisions of prior panels absent an intervening en banc or Supreme Court decision, or relevant legislation." ***Cannon v. U.S. Dept. of Justice, U.S. Parole Com'n***, 973 F.2d 1190, 1196 (5th Cir. 1992); "We may not ignore the decision of a prior panel ..." ***U.S. v. Gonzalez-Balderas***, 11 F.3d 1218, 1222 (5th Cir. 1994); "In accordance with our long-established rule, we are bound to follow the earliest dispositive articulation of a rule as the decision of one 'panel may not overrule the decisions, right or wrong, of a prior panel in the absence of an en banc reconsideration or superseding decision of the Supreme Court." ***U.S. v. Crouch***, 51 F.3d 480, 483 (5th Cir. 1995).

The Fifth Circuit has, in numerous cases, stated it was procedurally foreclosed from deviating from Circuit precedent. "[W]e are without authority to overrule a decision of a prior panel of this Court on the same question." ***U.S. v. Howde***, 596 F.2d 696, 704 (5th Cir. 1979); "[W]e are without power to overrule a decision of another panel. That tasks falls squarely to the full Court sitting en banc." ***Ford v. U.S.***, 618 F.2d 357, 361 (5th Cir. 1980); "No rule is more firmly settled in our Circuit 'no panel ... an overrule a decision previously made by another'." ***Johnson v. Moral***, 843 F.2d 846, 847 (5th Cir. 1988).

In ***Samaad v. City of Dallas***, 922 F.2d 216, 219 (5th Cir. 1991), the defense counsel urged the Court "...to conclude that the prior panel's decision was not correct and, if correct, should not be applied to this case. This request is remarkable in light of the well known and long standing rule of decision in this Circuit that one panel cannot overrule another. We are bound by [precedent] and similar opinions ... and could not overrule them even if they incorrectly interpreted [a Supreme

Court case]."

"[U]nder Federal Rule of Appellate Procedure 47, each court of appeals has authority to make rules 'governing its practice' either through rule making or adjudication." ***Ortega-Rodriguez v. United States***, 507 U.S. ____, 122 L.Ed.2d 581, 600 (1993)(emphasis added), Chief Justice Rehnquist, with whom Justice White, Justice O'Connor, and Justice Thomas join, dissenting. The Fifth Circuit made Rule 47.5.3 which states as amended "Unpublished opinions issued before January 1, 1996 are precedent." The Court, through adjudication, has stated "[I]n this Circuit all opinions, even unpublished ones, bind subsequent panels absent a contrary decision of the Supreme Court or of this Court en banc." ***Garcia v. U.S.***, 22 F.3d 609, 611 (5th Cir. 1994). Rule 47.5.3 is Circuit law and thus regulates and controls the actions and conduct of the Court.

The Fifth Circuit follows "...the rule that alternate holdings are binding precedent and not obiter dictum. "A decision that is not necessary to support the ultimate ruling, such as an alternative holding, on issues that were fully presented and litigated, is not dictum and is binding precedent." ***Pruitt v. Levi Strauss & Co.***, 932 F.2d 458, 465 (5th Cir. 1991); "It has long been settled that alternative rationales for a given result have precedential value. 'It does not make a reason given for a conclusion in a case obiter dictum, because it is only one of two reasons for the same conclusion'." ***Pruitt v. Levi Strauss & Co***., supra, quoting ***Richmond Screw Anchor Co. v. United States***, 275 U.S. 331, 340 (1928).

There was established dispositive Circuit precedent before **PACKER** entered into a plea agreement, pled guilty or was sentenced. **PACKER** was sentenced on November 4, 1994. ***U.S. v. James B. Mitchell***, No.'s 928615 & 92-8616 (5th Cir.

November 26, 1993) [9 F.3d 1547 (Table)] App. F, had been decided nearly one year earlier.

"Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of state decisis. Absent [intervening developments in the law] or compelling evidence bearing on Congress' original intent, our system demands that we adhere to our prior interpretations of statutes." ***Neal v. United States***, 133 L.Ed.2d 709 (1996). In ***Mitchell*** the government argued that guideline commentary Section 2.J1.6 n.3 complied with the consecutive sentence requirement of 18 U.S.C. Section 3146, App. G, the panel agreed with this statutory interpretation and affirmed ***Mitchell's*** sentence. Since ***Stinson*** was decided 6 months before ***Mitchell***, the Fifth Circuit panel had the full benefit of the Court's holdings in ***Stinson*** and found that Section 2J1.6 n.3 complied with the consecutive sentence requirement of 18 U.S.C. Section 3146. There have been no intervening developments in the law or compelling evidence bearing on Congress' original intent. The circuit courts cannot be any less bound than the Supreme Court to follow their prior statutory interpretations.

When the Fifth Circuit decided ***Mitchell***, and established Circuit precedent for sentencing in accordance with Amendment 403 to Section 2J1.6, they were in accord with the other circuits and with the cases the government cited as authority in its brief. App. G. The Court, in not considering or adhering to its own precedent, in the **PACKER** decision, placed itself squarely in conflict with every other Circuit which had decided this issue. See STATEMENT section @ p.9. The Third Circuit stated in ***American Iron and Steel Institute v. E.P.A.***, 560 F.2d 589, 596 (3rd Cir. 1977), "[W]e believe, that the interest in uniformity may transcend the territorial borders of any one circuit. When a court of appeals finds itself opposed by the asservations of the majority of its

sister circuits, then a re-evaluation of its own position may be in order."

The Fifth Circuit, in **PACKER's** opinion, stated there was a conflict between the commentary of Section 2J1.6 n.3 and 18 U.S.C. Section 3146, citing ***Stinson v. U.S.***, supra as authority. ***Stinson***, was decided on May 3, 1993, six months before ***Mitchell***; therefore, it is reasonable to conclude the Fifth Circuit found no conflict between the Guideline commentary and the statute; and, since ***Stinson***, was decided six months before ***Mitchell***, it cannot by definition be an intervening decision. There have been no other Supreme Court decisions, Fifth Circuit hearings en banc or intervening changes in the law relating to this issue.

Even if the panel in the ***Packer*** decision believed that ***Mitchell*** was an incorrect interpretation of statute 18 U.S.C. 3146, the Fifth Circuit has stated "Even if we were convinced that ***In re Goff*** [Circuit precedent] states an incorrect interpretation of section [11 U.S.C.] 541 (c)(2), we still would have no authority to overrule an earlier decision of our Court. In this circuit, one panel may not overrule the decision, right or wrong, of a prior panel." ***Matter of Dyke***, 943 F.2d 1435, 1443 (5th Cir. 1991).

[W]hen people say one thing, they do not mean another." Politz, C.J., ***U.S. v. Bellazerius***, 24 F.3d 698, 701-02 (5th Cir. 1994) quoting 2A Sutherland Statutory Construction at Section 47.24 at 228 (5th ed. And 1993 Supp.). Chief Judge Politz and the Fifth Circuit have continuously said what they meant and meant what they said when stating that neither a subsequent appellate panel nor a district court within the Circuit have the "power" or "authority" to contravene Circuit precedent and are "bound" by dispositive Circuit decisions. Individuals before the courts have a due process right to be

able to rely on he asservations of the courts. Therefore, by the Court's own asservations, any sentence or Circuit opinion which contravenes dispositive Circuit precedent must be declared an "ultra vires" act and hence void and without force and effect when issued.

Mitchell, was the dispositive Circuit precedent when **PACKER** pled guilty and upon which he reasonably relied as an "example" of how he would be sentenced. **PACKER**, because of his detrimental reliance, was prejudiced due to being sentenced to **at least** sixteen (16) months more than he would have been had the Court adhered to Circuit precedent and the guidelines.

The Supreme Court in ***Elder v. Holloway***, 510 U.S. _____ (1994), in remanding the case back to the Court of Appeals for it to consider relevant precedent not considered in its initial appellate review, held "[A]ppellate review of qualified immunity dispositions is to be conducted in light of all relevant precedents, not simply those cited to or discovered by the district court." The Court stated, in rejecting the Ninth Circuit's rule of not using precedent not presented in the District Court in appellate review, "The Ninth Circuit's rule could have a number of untoward effects. It could occasion appellate affirmation of incorrect legal results..." Id. @ 127 L.Ed. 344, 350 n.3. See ***Lawrence v. Chater***, 516 U.S. _____ (1996); ***Stutson v. United States***, 516 U.S. _____ (1996). Granting certiorari, vacating judgment below and remanding the case (GVR) proper where lower court's order showed no sign of having applied relevant precedent.

The Supreme Court has held that the Executive and Legislative branches of government are bound by their own procedural rules to be binding on the State Department and Department of the Interior, respectively. "It is well settled that

a Executive Agency of the Government is bound by its own regulations, which have the force and effect of law, and the failure of an agency to follow its regulations renders its decision invalid." ***Gulf States Mfrs., Inc. v. N.L.R.B.***, 579 F.2d 1298, 1308 (5th Cir. 1979). "It has long been settled ... that rules of Congress and its committees are judicially cognizable and a legislative committee has been held to observance of its rules ..." ***Yellin v. United States***, 374 U.S. 109, 1 14 (1963). In ***Yellin***, supra, in reversing a contempt conviction, the Supreme Court held that ... "the witness' reasonable expectation is that the [Congressional] Committee actually does what it purports to do, adhere to its own rules. To foreclose a defense based upon those rules, simply because the witness was deceived by the Committee's appearance of regularity, is not fair." ***Yellin***, @ 123-24. "Where the rights of an individual are affected, it is incumbent upon agencies to follow their own procedures. This is so where the internal procedures are possibly more rigorous than otherwise would be required." ***Morton v. Ruiz***, 415 U.S. 199, 235 (1974). "[C]entral to our concept of due process, [is] that government officials, no less than private citizens, are bound by rules of law." ***Caceres***, supra @ 758.

Surely, where the life and liberty interest of an accused are at stake, it can be no less mandatory for the Courts to adhere to their own procedural rules. "What is at stake for an accused facing death or imprisonment demands the utmost solicitude of which courts are capable..." ***Boykin v. Alabama***, 395 U.S. 238, 243-44 (1969). "When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interest in judicial efficiency and finality must occasionally be accommodated." ***Stutson***, 133 L.Ed. 571, 576

II. Packer's Plea was Rendered Involuntary When the District Court Did Not Adhere to the Court's and the Government's Commitments Upon Which Packer Detrimentally Relied

The applicable Supreme Court precedents clearly hold the Courts and the government accountable with regard to any commitments made to induce a defendant to plead guilty. "A plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the Court, prosecutor, or his own counsel, must stand unless induced by ... misrepresentations (including unfulfilled or unfulfillable promises)..." ***Brady v. United States***, 397 U.S. 742, 755 (1970) quoting ***Shelton v. United States***, 242 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc); "[W]hen it develops that the defendant was no fairly apprised of its consequences or when the defendant pleads guilty on a false premise in the prosecutions plea agreement, a guilty plea violates the Due Process Clause." ***Mabry v. Johnson***, 467 U.S. 504, 509 (1984). "It follows that when the prosecution breaches its promise with respect to an executed plea agreement, the defendant pleads guilty on a false premise, and hence his conviction cannot stand; "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." ***Mabry v. Johnson***, supra, quoting ***Santobello v. New York***, 4040 U.S. 257, _____ (1971).

Black's Law Dictionary, Sixth Edition 1990, defines accordance as "agreement, harmony, concord or conformity" and pursuant as "in conformance to or agreement with."

PACKER argued on appeal that he was not sentenced in conformity with the Guidelines in numerous instances. **PACKER's** plea agreement stated "his sentence will be imposed in accordance with the Sentencing Guidelines and Policy Statements" App. C, and the Court made the commitment "you're going to be sentenced pursuant to the sentencing guidelines". App. D, in the plea colloquy.

PACKER reasonably believed that the direct consequences of his guilty plea was that he would be sentenced in accordance with the Guidelines. It would disingenuous to argue that the Court's and the government's language only meant that the Court was to apply the proper Guideline section or only use the Guidelines as a basis for sentencing. The Supreme Court has held in cases interpreting a word's meaning, the word must be given its "ordinary or natural" meaning. ***Bailey v. United States***, 516 U.S. ____ (1995); ***Ratzlaf v. United States***, supra.

PACKER relied on the unambiguous language of the plea agreement in cooperating with the State of Texas as the key witness in an internationally televised capital murder trial and later in pleading guilty to federal charges. **PACKER** had a due process right to reasonably rely on these commitments, ***Correale v. United States***, 479 F.2d 944, 946-49 (1st Cir. 1973), especially on the commitments of the Court he new was going to sentence him.

"[T]he due process clause requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights..." ***U.S. v. Eliason***, 3 F.3d 1149, 1153 (7th Cir. 1993). The words accordance and pursuant are unambiguous and were unambiguous in the context in which they were used.

Even if it could be disingenuously argued they were ambiguous, the Courts have held "Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise. The government ordinarily must bear responsibility for any lack of clarity as responsible public servants who recognize the desirability of clarity in agreements." ***U.S. v. De La Puente***, 8 F.3d 1333, 1338 (9th Cir. 1993) (internal quotations omitted).

PACKER's plea was based on his reasonable reliance on the explicit commitments made to him by the Court and the prosecutor, and on the implicit commitment, that the District Court would follow dispositive Circuit precedent. At sentencing when it developed that these commitments which induced **PACKER's** plea, were not complied with to his detriment, his plea violated due process and was rendered involuntary and thus void and unenforceable.

III. A Constitutionally required Voluntary Plea of Guilty is a Required Predicate to and Enforceable Appeal Waiver

The plea colloquy, provided in Rule 11 of the Federal Rules of Criminal Procedure, constitutes the constitutional minimum requirements for a knowing and voluntary plea for the federal courts. The Constitution does not allow the Courts to accept an involuntary guilty plea. The closest the Courts may come to permitting such a conviction is an Alford plea and even then the Court must find some evidence of guilt or a factual basis for accepting the plea. ***North Carolina v. Alford***, 400 U.S. 25, 38 n.10 (1970).

"[I]f a defendant's guilty plea is no equally voluntary and knowing, it has been obtained in violation of due process and

is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." ***McCarthy v. United States***, 394 U.S. 459, 466 (1969); ***Boykin v. Alabama***, 395 U.S. 238, 243 n.5 (1969). In ***Henderson v. Morgan***, 426 U.S. 637 645 (1976), the defendant stated he would not have pled guilty if his attorneys had informed him that intent was an element of the offense. The Court held that "clearly the plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process." (internal quotes omitted)

PACKER argued on appeal that his plea was involuntary and thus void and unenforceable, because neither the Court, nor the government or his own attorney's informed him of the element of specific intent to violate the law established by ***Ratzlaf***. The Fifth Circuit, in its review, ignored the Supreme Court's precedent's of ***Ratzlaf***, and the precedents regarding the constitutional prohibition of accepting an involuntary guilty plea. The panel only reached the issue that **PACKER** agreed not to challenge any finding of guilt in his plea agreement and that the District Court informed him of his appeal waiver. **PACKER's** guilty plea as to the offense of structuring, was prima facie void and of no force or effect when entered; therefore, since the plea was unenforceable, its terms, including the appeal waiver, were equally unenforceable.

The Seventh Circuit has summarized the constitutionally correct approach regarding the review of appeal waivers stating "Obviously a waiver will be upheld only if the record

clearly demonstrates that the defendant knowingly and voluntarily entered into the plea agreement." ***U.S. v. Schmidt***, 47 F.3d 188, 190 (7th Cir. 1995); "Waivers of appeal must stand or fall with the agreements of which they are a part. If the agreement is voluntary and taken in compliance with Rule 11, then the waiver of appeal must be honored. If the agreement is voluntary and otherwise unenforceable, then the defendant is entitled to appeal." ***U.S. v. Wenger***, 58 F.3d 280, 282 (7th Cir. 1995).

The circuit opinions upon which the acknowledged Fifth Circuit precedential case, ***United States v. Sierra***, No. 91-4342 (5th Cir. 1991) [951 F.2d 345 9Table)], attachment in ***U.S. v. Melancon***, 972 F.2d 566 (5th Cir. 1992), relies address the valid plea of guilty predicate of an enforceable appeal waiver. See ***U.S. v. Wiggins***, 905 F.2d 51 (4th Cir. 1990) "The government has added the [appeal] waiver language to its standard plea precisely because it preserves the finality of judgments and sentences imposed pursuant to valid pleas of guilty." (emphasis added); ***U.S. v. Navarro-Botello***, 912 F.2d 318, 321 (9th Cir. 1990). "We reviewed the record and find the Rule 11 requirements were satisfied. On this record, we find that Navarro-Botello's negotiated plea agreement and his guilty plea were knowingly and voluntarily made." (emphasis added)

The court told **PACKER** in the plea colloquy hearing "I want to explain to you, Mr. Packer, the elements of the offenses to which you have pled guilty. These are the elements that must be proven to the satisfaction of a jury before a reasonable doubt before you could be found guilty." App.; but then, the Court failed to apply the precedent established by ***Ratzlaf***. The Fifth Circuit has consistently reversed convictions on the Court's failure to include the

essential element established by ***Ratzlaf***. See STATEMENT section p.10.

PACKER was denied due process of law and his resulting involuntary guilty plea constituted "a fundamental defect" in his conviction which resulted in "a complete miscarriage of justice". ***McCleskey v. Zant***, 499 U.S. 467, 494 (1991). Surely no fair minded person will contend that those who have been deprived of their liberty without due process of law ought nevertheless to languish in prison." ***Fay v. Noia***, 372 U.S. 391, 441, (1963). "[T]he principles of comity and finality ... must yield to the imperative of correcting a fundamentally unjust incarceration." ***Murray v. Carrier***, 477 U.S. 478, 495 (1986).

IV. A Sentencing Guideline Commentary Can Only Be Invalidated When the Record Reflects that the Review was Conducted Under the Substantial Deferential Standard of Review, the Narrow Inquiry of Sufficient Reasonability and Precedents Set Fort in *Stinson v. United States*

"The [Sentencing] Commission has the statutory obligation "periodically [to] review and revise" the guidelines in light of its consultation with authorities on and representatives of the federal criminal justice system. 28 U.S.C. Section 994(o)" ***Stinson***, supra @ 608. "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." ***Braxton v. United States***, 500 U.S. 344, 348 (1991).

The Commission in compliance with its statutory duty of review and revision and to develop a coherent sentencing

regime, revised Guideline Section 2J1.6 inserting Note 3 with Amendment 403, effective November 1, 1991. The text of Section 2J1.6 n.3 discusses the perceived conflict between 18 U.S.C. Section 3146 (b)(2) and the Guidelines and the resolution of this perceived conflict. Every court of appeals which has reviewed this guideline commentary has found it to work in harmony with the statute and has explained why the grouping rules of Section 2J1.6 n.3 and Section 3C1.1 n.6 must be adhered to to prevent "double counting" of offense behavior. ***U.S. v. Lacey***, 969 F.2d 926, 930 (10th Cir. 1992); ***U.S. v. Shaw***, 883 F.2d 10, 13 (5th Cir. 1989)(holding Section 3D1.2(c) "recognize[s] the potential for "double counting" in certain cases and provide[s] specific admonition[] to avoid it"); ***U.S. v. Nelson***, 919 F.2d 1381, 1384 (9th Cir. 1990)("[T]he rules for grouping of offenses were included in part to 'prevent multiple punishment for substantially identical offense conduct.'"(quoting U.S.S.G., Chapter 3, Part D, intro comment.).

The Fifth Circuit, in finding a conflict between 18 U.S.C. Section 3146(b)(2) and Section 2J1.6 n.3 stated, "The guideline treatment of Section 3146(b)(2) would defeat the statutory intent that a failure to appear offense be considered separate and distinct from the underlying offenses, warranting a separate and distinct penalty." App. A, p 49a.

In ***U.S. v. Mitchell***, supra, the government, in its brief, argued that "The two sentences [for the underlying offense and for failure to appear] in essence effectuate the 'grouping' requirements set forth above [Section 2J1.6 n.3 and Section 3C1.1 n.6] and also comply with 18 U.S.C. Section 1346 (sic) [3146] which mandates that the sentence for failing to appear 'shall be consecutive to the sentence of imprisonment for any other offenses'. Thus, the district court properly determined

Appellant's sentence in accordance with the guidelines." App. F, p.9. The Court agreed that the guidelines complied with the consecutive sentence provision of 18 U.S.C. Section 3146 and affirmed ***Mitchell's*** sentence.

The Court, two (2) years later, in **PACKER's** decision, citing no authority, no precedents, and no standard of review, found the same guideline commentary, Section 2J1.6 n.3, in sufficient conflict with the same statute, 18 U.S.C. Section 3146(b)(2), to invalidate it. There had been no relevant Supreme Court decisions, en banc hearings or changes in the law. The Court's invalidation of this guideline commentary without considering the Supreme Court's precedents and standards of review can only be characterized as arbitrary and capricious and must be remanded for correct review.

The Supreme Court, in ***Stinson***, the decision the Fifth Circuit used to invalidate the guideline commentary, states the standard of review to be used in reviewing an agency interpretation of a statute. The Supreme Court's standard of review stated in ***Stinson***, is that the agency interpretation of a statute must be given "controlling weight", ***Bowles v. Seminole Rock & Sand Co.***, 325 U.S. 410, 414 (1945); "substantial deference", ***U.S. v. Larionoff***, 431 U.S. 864, 872 (1977); "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charge with its administration." ***Udall v. Tallman***, 380 U.S. 1, 16-17 (1965). (emphasis added). "[I]n determining whether the Commission's action was contrary to law, the task for the Court of Appeals was no to interpret the statute as it thought best but rather the narrower inquiry into whether the Commission's construction was sufficiently reasonable to be accepted by a reviewing court. To satisfy this standard it is

not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." ***FEC v. Democratic Senatorial Campaign Comm.***, 454 U.S. 27, 39 (1981) (emphasis added) (internal quotations omitted).

"The Commission ... drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute." ***Stinson*** supra @ 608. "The Sentencing Commission brings expertise to the implementation of its mandate, and we must accordingly defer to its interpretation as long as it is sufficiently reasonable in light of the congressional directive." ***U.S. v. Kennedy***, 32 F.3d 876, 889 (4th Cir. 1994). "The [Sentencing] Commission's discharge of its delegated [rulemaking] authority is entitled to deference, we can ask only whether [guideline] is a reasonable permissible construction of [statute authorizing guideline]." ***U.S. v. Doe***, 934 F.2d 353, 359 (D.C. Cir. 1991). "Extraordinary deferential standard of review of evaluating guideline commentary suggested by some scholars discussed in ***U.S. v. LaBonte***, 70 F.3d 1396, 1404 n.6 (1st Cir. 1995). Nowhere in the Fifth Circuit's opinion does it reflect the Court having considered this standard of review or other relevant Supreme Court precedents.

Appellate review must be conducted in light of all relevant Supreme Court precedents and applicable standards of review and the associated record must reflect such compliance. Anything less must be labeled as arbitrary and capricious and

must be remanded for correct review.

CONCLUSION

FOR THESE REASONS, Petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Nov. 22, 1995]

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 94 -41214, 94-41215, 94-1216

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JODIE TIMOTHY PACKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

Before POLITZ, Chief Judge, WISDOM and STEWART, Circuit Judges.

POLITZ, Chief Judge:

Convicted on guilty pleas of multiple counts, Jodie Timothy Packer appeals his convictions, in part, and his sentences. Finding neither error nor abuse of discretion we affirm.

Background

The relevant scenario began in 1985 when Packer, a successful Dallas businessman, met Joy Aylor. Two years before Aylor had paid to have the girlfriend of her estranged husband killed. On may 26, 1988, she was arrested for capital murder. When she was released on bail later that day Packer picked her up and she confessed her complicity in the murder. As the trial drew near Aylor fled first to Canada and then Mexico, where Packer met her. Packer aided in Aylor's flight and avoidance of trial by securing for her a false birth certificate used in obtaining an Oklahoma driver's license and a passport under the assumed name. In the meantime, Packer was indicted in 1991 in the Eastern District of Texas for his involvement in Aylor's flight to avoid prosecution. He was released on bail, liquidated some properties, and fled the country with a large sum of money using a new alias. He lived for a time on a yacht in the Bahamas. He was the subject of search by several government agencies for about three years before his arrest on May 5, 1994 while attempting to re-enter the United States from Mexico.

Packer and the government entered into a plea agreement under which he pled guilty to seven counts of superseding indictment returned by the grand jury for the Eastern District of Texas, specifically, concealing a person from arrest, conspiracy to commit passport fraud, passport fraud, use of a fraudulent social security number, mail fraud, and failure to appear. Additionally, he pled guilty under Fed.R.Crim.P. 20, to charges in the Southern and Northern Districts of Texas that he structured financial transactions to evade reporting requirements.

. In sentencing the trial judge found Packer to be in criminal history category I and, after grouping the offenses other than the failure to appear count, found a criminal offense level of

16.[1] The resulting guideline sentencing range was 21-27 months for the grouped offenses. In addition the court found an offense level of 12 for failure to appear charge which resulted in a sentencing range of 10-16 months. The court sentenced Packer to 27 months on the grouped charges, with a consecutive 16 month sentence on the failure to appear charge, and the court imposed a fine.

Packer challenges his conviction on the structuring counts and several aspects of the sentencing.

ANALYSIS

Structuring Convictions

Packer maintains that his pleas of guilty to the structuring of financial transaction charges are invalid because the court failed to advise him of an essential element of the offense as required by Fed.R.Crim.P. 11. The government counters that Packer may not raise this issue on appeal because the plea agreement states, in relevant parts:

> [T]he Defendant waives the right to appeal any issue, save and except, issues related to the application of the Sentencing Guidelines in sentencing the Defendant or the basis for any upward departure, if any, which the Court might impose in sentencing. Any appeal is limited to those issues identified herein. . . . The Defendant knowingly waives his right to appeal all issues, save and except, those mentioned above, in exchange for the concessions made by the Government in this agreement.

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[1] U.S.S.G. Sections 3D1.2, 3D1.3, 3D1.4 (Nov. 1993).

A defendant's waiver of the right to appeal is not informed if the defendant does not know the consequences of his decision.[2] The language of the agreement leaves no doubt that Packer waived all issues on appeal except issues related to sentencing. Further, during the Rule 11 colloquy Packer attested that he understood he had a right to appeal his sentence but that he had waived his "right to appeal any finding of guilt that the Court may make pursuant to [his] pleas of guilty." Finally, there is nothing in the record to indicate that Packer, a college-educated successful businessman, did not understand the consequences of entering into the plea agreement with the government limiting his right to appeal to matters involving the application of the sentencing guidelines or an upward departure.

Failure to Appear

The guidelines require grouping of "closely related" offenses[3] and the use of the individual offense with the highest level as the offense level.[4] The commentary to section 2J1.6 informs that "the failure to appear count and the count(s) for the underlying offense are grouped together under Section 3D1.2(c)."[5] From this linchpin Packer maintains that the failure to appear offense should have been grouped with the various underlying offenses. We are not persuaded.

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[2] United States v. Baty, 980 F.2d 977 95th Cir.), cert. Denied, 113 S.Ct.2457 (1992.

[3] USSG Section 3D1.2

[4] Id. At Section 3D1.3(a); **United States v. Gallo**, 927 F.2d 815 (5th Cir. 1991)

[5] USSG Section 2J1.6 comment. (n.3).

Section 3145(b)(2) of Title 18 of the United States Code requires that "[a] term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense." The guidelines address the apparent conflict between sections 3146 and 2J1.6 by providing that the court, after grouping the failure to appear counts with the underlying counts, should earmark a portion of the total punishment as a consecutive sentence for the failure to appear count.[6]

In **Stinson v. United States,**[7] the Supreme Court held that guideline commentary is authoritative unless it violates the Constitution or an applicable statute. Therefore, if guideline commentary 2J1.6 n.3 conflicts with statutory section 3146 we must apply the latter.[8] The guideline treatment of section 3146(b)(2) would defeat the statutory intent that a failure to appear offense be considered separate and distinct from the underlying offenses, warranting a separate and distinct penalty. The district court did not err by declining to group the failure to appear count with the other counts and by imposing the failure to appear sentence consecutive to the other sentence.

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[6] Id.

[7] 113 S.Ct. 1913 (1993)

[8] **Stinson.** See also **United States v. Schmeltzer**, 960 F.2d 405, 408 (5th Cir.), cert. Denied, 113 S.Ct. 609 (1992) ("All of the United States Courts of Appeal have agreed that statutorily mandated sentences are incorporated into the Sentencing Guidelines and prevail over the guidelines when in apparent conflict.") 18 U.S.C. Section 3146 does not mandate a term of imprisonment but rather requires that any term of imprisonment must be imposed consecutively. Packer attaches significance to this distinction. It is a distinction, however, with no relevance to the determination whether section 3146 precludes grouping. Manifestly, a direction that a sentence, if any, must be imposed consecutively is no less binding that a direction that a mandatory sentence must be imposed consecutively.

Grouping

Section 3D1.2 dictates that "[a]ll counts involving substantially the same harm shall be grouped together into a single Group."[9] Section 3D1.2 identifies four alternative methods to determine what constitutes "substantially the same harm."[10] The district court divided the counts of conviction, other than the failure to appear count, into four groups: (1) social security fraud and mail fraud; (2) passport fraud and conspiracy to commit passport fraud; (3) concealing a person from arrest; and (4) the two structuring counts.

Packer maintains that all of the offenses should have been grouped into one group except the second structuring count which occurred after Aylor's arrest, because all sought a common criminal objective, i.e., preventing the discovery and arrest of Aylor.[11]

Packer did not object to the grouping and we review only for plain error.[12] Packer makes a forceful argument that each of the offenses, except the later structuring count, are connected by a common criminal objective. He overlooks the requirement of section 3D1.2(b) that the counts involve the same victim. Relevant in the case at bar is the alternative for offenses without victims. Application note 2 suggests that "the grouping decision for [victimless crimes] must be based primarily upon the nature of the interest invaded by each

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[9] USSG Section 3D1.2

[10] **Id.** Application note 7 indicates that these methods are alternative and that any one or more may be applied. **Id.** At Section 3D1.2 comment. (n.7)

[11] **Id.** At Section 3D1.2(b).

[12] **United States v. Calcerley**, 37 F.3d 160 (5th Cir.)(en banc), cert. Denied, 115 S.Ct. 1266 (1995); **United States v. Torrez,** 40 F.3d 84 (5th Cir. 1994)

offense."[13] The district court did not err by determining that different interests were invaded by the conspiracy to commit and substantive passport fraud, the structuring offenses, concealing a person from arrest, and the social security and mail fraud offenses.

Acceptance of Responsibility

Packer contends that he should have received an additional one point reduction for his acceptance of responsibility. We review for plain error. Section 3E1.1(b) establishes a three part test to determine whether a defendant has earned the additional point[14] to which defendant is entitled if he qualifies.[15] Mindful that the "sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility" and that the judgment thereon is "entitled to great deference on review", we conclude that the district court did not err by finding that the delay between Packer's re-arrest and his entry of a plea of guilty vitiated the award of the additional reduction in offense level.[16]

Adjustment for Knowledge of Unlawful Activity

Packer contends that the court improperly applied USSG Section 2S1.3 to the structuring counts. That section provides for a base offense level of six together with the levels from the table in section 2F1.1 corresponding to the value of the

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[13] **Gallo,** 927 F.2d at 824 (citing USSG Section 3D1.2, Comment. (n.2).

[14] **United States v. Gonzalez,** 19 F.3d 982 (5th Cir.), cert. Denied, 115 S.Ct. 229 (1994)

[15] **United States v. Mills,** 9 F.3d 1132 (5th Cir. 1993)

[16] USSG Section 3E1.1(b)(2) & comment. (n.5)

funds.[17] Additionally, this section also provides for an additional two point increase if the defendant knew or believed that the funds were intended to promote unlawful activity.[18] We review this finding of fact for clear error.[19] The pre-sentence report, which may be considered as evidence,[20] provides sufficient support for the conclusion that Packer believed the funds would be utilized to support himself and Aylor.[21] The district court did no err in applying section 2S1.3(b)(1).

Ineffective Assistance of Counsel

Much of Packer's ineffectiveness argument is mooted by our conclusion that the district court correctly applied the sentencing guidelines. Packer may have a complaint about counsel's alleged failure to advise him of a necessary element of the structuring counts. "[A] claim of ineffective assistance of counsel generally cannot be addressed on direct appeal unless the claim has been presented to the district court; otherwise there is no opportunity for the development of an adequate record on the merits of such a serious allegation."[22] As this issue is raised for the first time on appeal, we may reach it only if the record makes possible a fair evaluation of the merits of the claim.[23] The record before us is not sufficiently developed. This issue must remain for another day.

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[17] **Id.** At Section 2S1.3

[18] **Id.** At Section 2S1.3(b)(1)

[19] **United States v. Sanders**, 942 F.2d 894 (5th Cir. 1991)

[20] **United States v. Lghodaro**, 967 F.2d 1028 (5th Cir. 1992)

[21] Packer provided no evidence to rebut the pre-sentence report. The court was free to adopt such findings without further inquiry. **United States v. Mir**, 919 F.2d 940 (5th Cir. 1990)

[22] **United States v. Mavejar**, 963 F.2d 732 (5th Cir. 1992)

[23] **United Statse v. Higdon,** 832 F.2d 312 (5th Cir. 1987), cert. Denied, 484 U.S. _____ (1988)

Fine

Packer alleges for the first time on appeal that the fine is excessive. We review for plain error. This contention lacks merit; the guidelines were correctly applied and the fine imposed is within the guideline range.[24]

Aggravating Role

Packer contends that the district court should not have increased his offense level under section 3B1.1(c) because the record does no reflect that he organized, led, managed, or supervised Aylor.[25] This is an issue of fact which we must review for clear error.[26]

Application note 4 provides guidance in determining whether Packer's participation amounted to "management" or "supervision" by stating that a factor to consider is "the degree of participation in the planning and organizing of the offense."[27] The record abundantly supports a finding that Packer organized the offenses at issue. He obtained the false documents, rented the villa in which they lived in France, provided the necessary funding, and established a bank account in France.

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[24] USSG Section 5E1.2(c)(4)

[25] **Id.** At Section 3B1.1(c). The district court applied section 3B1.1(c) to the concealing a person from arrest count and the passport counts.

[26] **United States v. Ronning,** 47 F.3d 710 (5th Cir. 1995). The pre-sentence report may be considered as evidence by the judge making the factual finding. See **Mir.** "A factual finding is not clearly erroneous if it is plausible in light of the record read as a whole." **United States v. Valencia,** 44 F.3d 269, 272 (5th Cir. 1995)

[27] USSG Section 3B1.4 comment. (n.4)

Substantial Assistance

"The decision whether to grant a Section 5K1.1 motion is committed to the discretion of the sentencing court."[28] The district court neither abused its discretion nor erred in refusing a downward departure.

The convictions and sentences are **AFFIRMED.**

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[28] **United States v. Franks,** 46 F.3d 402, 406 (5th Cir. 1995)

APPENDIX B

[Filed Jan. 3, 1996]

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Nos. 94-41214, 94-41215, 94-1216

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JODIE TIMOTHY PACKER,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 11-22-95, 5 Cir., ( ), (____) F.3d (____))
(1-3-96)

Before POLITZ, Chief Judge and WISDOM and STEWART, Circuit Judges

PER CURIAM:

(X) Treating for Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en bank (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Henry A. Politz
United States Circuit Judge

REHG-6

CLERK'S NOTE:
SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX C

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall be … deprived of life, liberty, or property, without due process of law[.]

STATUTORY PROVISION INVOLVED

Title 18 U.S.C. Section 3146 provides in pertinent part:

Section 3146 Penalty for Failure to Appear

(a) Offense - Whoever, having been released under this chapter knowingly -

(1) fails to appear before a court as required by the conditions of release; or
(2) fails to surrender for service of sentence pursuant to a court order;

shall be punished as provided in subsection (b) of this section.

(b) Punishment -

(2) A term of imprisonment imposed under this section shall be consecutive to the sentence of imprisonment for any other offense.

UNITED STATES SENTENCING COMMISSION GUIDELINES MANUAL PROVISIONS INVOLVED

Guideline Section 2J1.6 Failure to Appear by Defendant provides in pertinent parts:

Application Notes:

3. In the case of a failure to appear for service of sentence, any term of imprisonment imposed on the failure to appear count is to be imposed consecutively to any term of imprisonment imposed for the underlying offense. See Section 5G1.3(a). The guideline range for the failure to appear count is to be determined independently and the grouping rules of Sections 3D1.2-3D1.5 do not apply.

   Other in the case of a conviction of both the underlying offense and the failure to appear, the failure to appear is treated under Section 3C1.1. (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offense are grouped together under Section 3D1.2(c). Note that although 18 U.S.C. Section 3146(b)(2) does not require a term of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of Section 5g1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. Section 3146(b)(2). For example, where the combined applicable guideline range for both counts 30-37 months for the underlying offense plus a consecutive six months sentence for the failure to appear count would satisfy these requirements.

Guideline Section 3C1.1 Obstructing or Impeding the Administration of Justice states in pertinent part:

Application Notes:

6. Where the defendant is convicted for an offense covered by . . . Section 2J1.6 (Failure to Appear by Defendant), this adjustment is not to be applied to the offense level for that offense except where a significant further obstruction occurred during the investigation, prosecution, or sentencing of the obstruction offense itself (e.g., where the defendant threatened a witness during the courts of the prosecution for the obstruction offense). Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under sub-section (c) of Section 3D1.2 (Groups of Closely Related Counts). The offense level for that group of closely related counts will be offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

Guideline Section 3D1.1 Procedure for Determining Offense Level on Multiple Counts states in pertinent part:

(b) Any count for which the statute mandates imposition of a consecutive sentence is excluded from the operation of Sections 3D1.2 - 3D1.5. (emphasis added)

Application Note

1. Counts for which a statute mandates imposition of a consecutive sentence are excepted from application of the multiple count rules. (emphasis added)

Guideline Section 3D1.2 Groups of Closely Related Counts states in pertinent part:

All counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(c) When one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

Application Notes:

5. Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. ...This provision prevents "double counting" of offense behavior.

Guideline Section 5G1.2 Sentencing on Multiple Counts of Conviction states in pertinent part:

(a) The sentence to be imposed on a count for which the statute mandates a consecutive sentence shall be determined and imposed independently. (emphasis added)
(b) Except as otherwise required by law (see Section 5G1.1(a),(b)), the sentence imposed on each other count shall be the total punishment as determined in accordance with Part D of Chapter Three, and Part C of this Chapter.

(c) If the sentence imposed on the count carrying the highest statutory maximum is adequate to achieve the total punishment, then the sentences on all counts shall run concurrently, except to the extent otherwise required by law.

United States Sentencing Guidelines, Appendix E, Questions Most Frequently Asked About the Sentencing Guidelines

Question 67. QUESTION: The defendant is sentenced for one count of failure to appear for trial on the drug charge. Are the two counts grouped together under the grouping rules in Chapter Three, Part D?

ANSWER: Yes. Effective November 1, 1991, Application Note 3 to Section 2J1.6 (Failure to Appear by Defendant) instructs that in such a case, the failure to appear is treated under Section 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense. Therefore, the failure to appear count and the count(s) for the underlying offense are grouped together under Section 3D1.2(c) (see also Application note 6 to Section 3C1.1). Application Note 3 further explains that although 18 U.S.C. Section 3146(b)(2) does not require a sentence of imprisonment on a failure to appear count, any sentence of imprisonment imposed on such a count must be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements of Section 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. Section 3146(b)(2). For example, where the combined applicable guideline range for both counts (after grouping) is 30-37 months and the court determines that a "total punishment" of 36 months is appropriate, a sentence

of 30 months for the underlying offense plus a consecutive six-month sentence for the failure to appear count would satisfy these requirements.

QUESTION 119: What should be done when a statute mandates that a term of imprisonment be imposed and that the term of imprisonment run consecutively to any other sentence (e.g., 18 U.S.C. Section 924(c)?

ANSWER: Under Section 5G1.2, the mandatory term of imprisonment runs consecutively to any other sentences imposed under the guidelines (see Section 3D1.1(b) and Application Note 1 to Section 3D1.1). To avoid double counting, special adjustment to the offense levels and guideline range may be required.

Note that this provision only applies where the statute mandates both a term of imprisonment be imposed and that it run consecutively to any other term of imprisonment. Certain statutes (e.g., 18 U.S.C. Section 3146, 3147) that require a consecutive sentence only if imprisonment is imposed are not included under this provision (see Application Note 3 to Section 2J1.6 and Application note 2 to Section 2J1.7). (emphasis added)

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 47, Federal Rules of Appellate Procedure provides in pertinent part:

Rule 47. Rules by Courts of Appeals

Each court of appeals by action of a majority of the circuit judges in regular active service may from time to time make and amend rules governing its practice not inconsistent with these rules. (emphasis added)

FIFTH CIRCUIT RULES

Fifth Circuit Local Rule 47.5.3, Unpublished Opinions., states "Unpublished opinions are precedent."

Note: The Fifth Circuit amended R. 47.5.3 effective January 1, 1996 to state "Unpublished opinions issued before January 1, 1996 are precedent."

APPENDIX D

[Filed Aug. 11, 1994]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA

VS. CRIMINAL NO. 4:91CR10

JODIE TIMOTHY PACKER

PLEA BARGAIN AREEMENT BETWEEN JODIE TIMOTHY PACKER AND THE UNITED STATES OF AMERICA

The United States of America, by and through its attorney of record, Assistant United States Attorney, RANDALL L. FLUKE, and JODIE TIMOTHY PACKER ("PACKER"), defendant, through his counsel of record, TERESA G. SANCHEZ, attorney at Law, in compliance with Rule 11(e) of the Federal Rules of Criminal Procedure, hereby acknowledge and agree as follows:

Defendant, PACKER agrees:

1. To enter a plea of guilty to Counts 1,2,3,4,5,7 and 9 of the second superseding indictment in the Eastern District of Texas, charging him as follows:

a. Count 1 – Violation of Title 18, United States Code, Section 1071, to-wit, Concealing Person from Arrest;

b. County 2 – Violation of Title 18, United States Code, Section 371, to-wit, Conspiracy to Violate 18 U.S.C. Section 1542, Passport Fraud;
c. Count 3 – Violation of Title 18, United States Code, Section 1341, to-wit, Use of Fraudulent Social Security Number;
d. Count 4 –Violation of Title 18, United States Code, Section 1341, to-wit, Mail Fraud;

is pleading guilty to with respect to the Southern District of Texas, pursuant to this agreement is a $500,000.00 fine and/or ten years imprisonment; up to five (5) years super-vised release. He further understands that pursuant to the provisions of 18 U.S.C. Section 3571 an alternative fine of not more that $250,000 may be imposed, and pursuant to 18 U.S.C. Section 3663 the Court may order restitution.

7. To fully completely and honestly cooperate with the United States and any state of local law enforcement agency by giving interviews to agents of the United States Department of State and the Federal Bureau of Investigation, the Department of Treasury, Internal Revenue Service, United States Customs Service, and any other federal law enforcement authority, as well as state and local authorities including representatives or agents of the Dallas County Attorney's Office, the Dallas County Sheriff's Office and Richardson Police Department. Defendant PACKER also agrees to provide full,

complete and solely truthful testimony before any federal or state grand jury and during the trial of this or any related investigations, including but not limited to, the trial of State of Texas v. Joy David Aylor pending in Dallas County, Texas, and during any related case or matter. Defendant PACKER also agrees to submit to one or more polygraph examinations under the direction of federal or state law enforcement authorities, if requested by either of such authorities.

8. Defendant is aware that his sentence will be imposed in accordance with the Sentencing Guidelines and Policy Statements. The Defendant nonetheless acknowledges and agrees that the Court has jurisdiction and authority to impose any sentence within the statutory maximum set for this offense. The Defendant is aware that 18 U.S.C. Section 3742 affords him the right to appeal his sentence. Knowing that, the Defendant waives the right to appeal any issue, save and except, issues related to the application of the Sentencing Guidelines in sentencing the Defendant or the basis for any upward departure, if any, which the Court might impose in sentencing. Any appeal is limited to those issues identified herein.

In agreeing to this waiver, the Defendant is aware that his sentence has not yet been determined by the Court. The Defendant is also aware that any estimate of the probable sentencing range under the Sentencing Guidelines that he may have received from his counsel, the Government or the Probation Office is a prediction, not a promise, and is not binding on the Government, the

Probation Office or the Court. The Government does not make any promise or representation concerning what sentence the Defendant will receive. Realizing the uncertainty in estimating what sentence he will ultimately receive, the Defendant knowingly waives his right to appeal all issues, save and except, those mentioned above, in exchange for the concessions made by the Government in this agreement.

9. To pay restitution as set out and ordered by the Court.

10. To pay the $50.00 per count special assessment required by 18 U.S.C. Section 3013, i.e. $450.00 total, tot he Clerk of the Court at the time of the guilty plea by cashier's check or money order.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

UNITED STATES OF AMERICA)		Docket Number
	)	
VS.	)	4:91cr10(1)
	)	
JODIE TIMOTHY PARKER	)	Sherman, Texas
	)	August 11, 1994
	)	10:38 a.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE PAUL BROWN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE UNITED STATES OF AMERICA:	MR RANDALL L. FLUKE Assistant U. S. Attorney One Grand Centre Suite 504 Sherman, Texas 75090 (903)868-9454
FOR THE DEFENDANT:	MR. CURTIS GLOVER Attorney at Law 1717 N. Harwood St. LB 126 Dallas, Texas 75201
COURT REPORTER:	DAVID A. MAXWELL P. O. Box 2929 Sherman, Texas 75091

Proceedings recorded by mechanical stenography, transcript produced by note reading.

Attorneys and the advice they have given you?

A Yes, Your Honor.

Q Have you had sufficient time to investigate any possible defenses that you may have to any of these charges to which you have entered a plea of guilty this morning?

A Yes, Your Honor.

Q THE COURT: Ms Sanchez, have you found Mr. packer able and willing to assist you in investigating and determining the facts of these cases?

MS. SANCHEZ: Yes, Your Honor, I do and I have.

THE COURT: Do you believe he understands the nature of the charges against him and the consequences of his plea of guilty or his pleas of guilty?

MS. SANCHEZ: Yes, Your Honor, I do.

BY THE COURT:

Q I want to explain to you, Mr. Packer, the elements of the offenses to which you have pled guilty. <u>These are the elements that must be proven to the satisfaction of a jury before a reasonable doubt before you could be found guilty.</u>

You are charged by the second superseding indictment field in this Court and by indictments filed by the Untied States

District Court for the Northern and Southern Districts of Texas, with several offenses, each of which are identified in the plea bargain agreement which has been tendered to the Court.

Count 9 of the second superseding indictment charges you with a violation of Title 18, United States Code, Section 3148 (a)(1), to-wit, failure to appear.

The essential elements of that offense are as follows:

A. That you were previously charged in this Court with violations of Title 18, United States Code, Sections 2, aiding and abetting, 1071, concealing a person from arrest, 371, conspiracy, and 1341, mail fraud, and with a violation of Title 42, United States Code, Section 408(g)(2), use of fraudulent Social Security number, all felonies punishable by imprisonment of five years or more.

B. That you had been released on bond by this Court on condition that you appear in Court for trial.

C. That you thereafter failed to appear for trial scheduled to commence on July the 29th, 1991, as required. And,

D. That you knew you were required to appear in Court for trial on that date and purposely failed to do so.

You are further charged by Count 1 of an indictment filed with the United States District Court for the Northern District of Texas to which you have entered a plea of guilty. And the essential elements of that offense are as follows:

That on or about the dates and at the places specified in the indictment, you knowingly and willfully structured and assisted in the structuring of financial transactions with one or more domestic financial institutions as set forth in the indictment. And,

B. That you did so for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a) and the regulations promulgated thereunder.

Now, lastly, you are charged by Count 1 of indictment filed in the United States District Court for the Southern District of Texas to which you have entered a plea of guilty this morning.

The essential elements of that offense are as follows:

A. That on or about the dates and at the places specified in the indictment, you knowingly and willfully structured or assisted in structuring the importation of monetary instruments as set forth in the indictment. And,

B. That you did so for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5316 and the regulations promulgated thereunder.

Now, Mr. Packer, there's a lot of different offenses there and a lot of different elements. I want to be sure you understand each one of them.

A Yes, Your Honor, I do

Q You don't need any further explanation of them?

A No, sir.

Released from imprisonment but you would have to conduct yourself according to the terms and conditions of you supervised release, and if you failed to do so, you could be punished or prosecuted for that. Do you understand that?

A Yes, sir.

Q Also, you can be liable for any restitution that you might be required to pay any victim of the offenses charged. I don't know whether restitution is a factor or not, but if it is, you can be liable for it. The Court can order it.

Now, the maximum penalty that can be imposed on the offense you pled guilty in the Northern District of Texas is the same as the offenses you've pled to in the Eastern District of Texas. In order words, up to five years imprisonment, a fine of $250,000, a term of three years, up to three years supervised release, and a mandatory special assessment of $50.00.

And then the offense in the Southern District of Texas is a fine of up to $500,000 and 10 years imprisonment and up to five years supervised release. In other words, you could be imprisoned up to that number of years and that amount of fines.

Anything you don't understand about that?

A No, sir, I understand it.

Q Now, we need to get into the sentencing guidelines. Have you discussed the – you're going to be sentenced pursuant to the sentencing guidelines. Do you understand that?

Laws regulating the issuance of passports and the rules prescribed pursuant to those laws?

A Yes.

Q Count 9 alleges the offense of failure to appear. Is it true that you were previously charged in this Court with violations of Title 18, United States Code, Sections 2, aiding and abetting, 1071, concealing a person from arrest, 371, conspiracy, 1341, mail fraud, and with a violation of Title 42, fraudulent use of a Social Security Number, all felonies punishable by imprisonment of five years or more?

A Yes

Q Is it true that you had been released on bond by this Court on condition that you appear in Court for trial?

A Yes

Q Is it true that you thereafter failed to appear for trial scheduled to commence on July 29th, 1991, as required?

A Yes

Q Is it true that you knew you were required to appear in Court for trial on that date and purposely failed to do so?

A Yes

Q You are charged by Count 1 of the indictment filed in the Northern District of Texas with structuring. Is it true that on or about the dates and at the places specified in the indictment, you knowingly and will fully structured and assisted in the

structuring of financial transactions with one or more domestic financial institutions, as set forth in the indictment from the Northern District, which I read a few moments ago?

A Yes

Q It is true that you did so for the purpose of evading the reporting requirements of Title 31, United States Code, Section 5313(a) and the regulations promulgated thereunder?

A Yes

Q Is it true with regard to the indictment filed in the Southern District of Texas, McAllen Division, which I read a few moments ago, that on or about the dates and at the places specified in the indictment, you knowingly and willfully structured or assisted in the structuring the importation of monetary instruments as set forth in the indictment I read for the Southern District of Texas?

A Yes

Q Is it true that you did so for the purpose of evading the recording requirements of Title 31, United States Code, Section 5316, and the regulations promulgated thereunder?

A Yes

THE COURT: Mr. Packer, the Court finds that each of your pleas is voluntary and knowledgeable and has a basis in fact that contains all of the essential elements of the offense charged. The Court accepts your pleas of guilty and finds you

APPENDIX F

[Filed Nov. 26, 1993]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8615
No. 92-8616
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES B. MITCHELL,

Defendant-Appellant

Appeal from the United States District Court
for the Western District of Texas
(DR-89-CR-08 & DR-89-54-CR)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges
PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no presidential value and merely decide articular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

BACKGROUND

On March 20, 1989, James B. Mitchell (Mitchell) pleaded guilty to aiding and abetting aviation smuggling. The organization with which Mitchell had been affiliated had flown 540 pounds of marijuana from Mexico to an airstrip near Uvalde, Texas. Mitchell disappeared, however, before he could be sentenced, but was arrested three years later in Las Vegas, Nevada, and was returned to Texas, where he made an initial court appearance on May 18, 1992. Mitchell then pleaded guilty to failing to appear at his sentencing for his prior charge of aviation smuggling.

The probation officer calculated Mitchell's base offense level as 26 on the aviation smuggling charge, to which he added three levels for Mitchell's role in the offense and two levels for obstruction of justice, arriving at a total offense level of 31. The probation officer placed Mitchell in criminal history category II. The probation officer determined Mitchell's base offense level on his failure-to-appear charge as six, to which he added nine levels because the aviation smuggling offense was punishable by more than 15 years imprisonment, and subtracted two levels for acceptance of responsibility. The probation officer thus arrived at a total offense level of 13. Mitchell remained in criminal history category II.

The district judge adopted the provisions of the PSRs at the sentencing hearing, with two exceptions. First, he increased the aviation smuggling offense level by only two levels for Mitchell's role in the offense instead of three levels in the PSR. Second, he decreased Mitchell's criminal history score by one point, which had no effect on Mitchell's criminal history category. The district judge overruled, inter alia,

Mitchell's objection to the nine level increase for failing to appear, and his objections to the two level increase for obstruction of justice, including his objection that the increase constituted double jeopardy. The court sentenced Mitchell to a 120-month term of imprisonment for aviation smuggling, and a 15-month term of imprisonment for failure to appear. Mitchell was to serve his sentence for failure to appear consecutively to his term for aviation smuggling.

OPINION

Mitchell first contends that, because he was being sentenced separately for his failure to appear, the upward adjustment to his offense level for aviation smuggling constitutes double jeopardy. Mitchell's contention is unavailing.

Mitchell was sentenced for both offenses at the same hearing, and the failure-to-appear conviction resulted from his failure to appear at his sentencing for aviation smuggling. "With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." ***Missouri v. Hunter***, 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).

The commentary to the failure-to-appear guideline provides:

> [I]n the case of a conviction on both the underlying offense and the failure to appear the failure to appear is treated under Section 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction

> of the underlying offense; and the failure to appear count and the Count(s) for the underlying offense are grouped together under section 3D1.2(c). Note that although 18 U.S.C. Section 3146 (b)(2) does not require a sentence of imprisonment on a failure to appear count, it does require that any sentence of imprisonment on a failure to appear count be imposed consecutively to any other sentence of imprisonment. Therefore, in such cases, the combined sentence must be constructed to provide a "total punishment" that satisfies the requirements both of section 5G1.2 (Sentencing on Multiple Counts of Conviction) and 18 U.S.C. Section 3146(b)(2)

U.S.S.G. Section 2J1.6, comment. (n.3). The commentary to section 3C1.1 provides:

> Where the defendant is convicted both of the obstruction offense and the underlying offense, the count for the obstruction offense will be grouped with the count for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related Counts). The offense level for that group of closely-related counts will be the offense level for the underlying offense increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

Section 3C1.1, comment. (n.6). Section 3D1.3 provides that "the offense level applicable to a Group is the offense level . . . for the most serious of the counts comprising the group[.]"

Section 3D1.3(a). The district court calculated Mitchell's offense level for aviation smuggling offense level as 30 and his offense level for failure to appear as 13. The overall offense level therefore should have been 30.

The range of imprisonment terms for a level-30, category II offender, is 108-135 months. Section 5A, sentencing table. Under the commentary to section 2J1.6, the district court's consecutive sentences of 120 and 15 months were appropriate, even though they were calculated separately. The aggregate 135-month term of imprisonment is within the limits set by the Sentencing Commission. Additionally, the guideline commentary directs that district courts should impose separate, consecutive sentences for failure to appear and underlying offenses. Mitchell's sentencing does no violate the Double Jeopardy Clause.

Mitchell next contends that the district judge erred by adding nine levels to his underlying offense, rather than six, to arrive at his offense level for failing to appear. Since the district judge should have considered Mitchell's failure-to-appear conviction according to note six of section 3C1.1 and the guidelines grouping mechanisms, the district judge erred by calculating separately Mitchell's offense level under the failure-to-appear guideline and imposing sentence based on the resulting sentencing range.

Counsel, however, does not challenge the district court's use of the guideline; he challenges only the nine-level

adjustment to the base offense level on the failure-to-appear charge. Mitchell did no object in the district court to the judge's use of the failure-to-appear guideline. The district court's use of the failure-to-appear guideline therefore may serve as a basis for reversal only if plainly erroneous. See ***U.S. v. Brunson***, 915 F.2d 942, 944 (5th Cir. 1990). Plain error is error which "seriously affect[s] the fairness, integrity

APPENDIX G

Nos. 92-8615 & 92-8616

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JAMES B. MITCHELL,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES OF AMERICA

JURISDICTION

This is an appeal from a final judgment of the district court in a criminal case. The jurisdiction of this court is invoked

pursuant to 18 U.S.C. Section 3742 and 28 U.S.C. Section 1291.

STATEMENT OF THE ISSUE

Whether the district court properly assessed a two level obstruction of justice adjustment following Appellant's failure to appear for sentencing (aiding and abetting aviation smuggling offense) and a separate 15 month consecutive sentence following Appellant's conviction for failure to appear.

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

By grand jury indictments returned February 27, 1989, and August 28, 1989, in the Del Rio Division of the Western District of Texas, Appellant, James B. Mitchell, was indicted for, inter alia, aiding and abetting aviation smuggling, in violation of 19 U.S.C. Section 1590(a) & 18 U.S.C. Section 2, and failure to appear in violation of 18 U.S.C. Section 3146, respectively (1 R. 65-67; 2R. 35)[1] On March 20, 1989, Appellant pleaded guilty to aiding and abetting aviation smuggling but failed to appear for sentencing (1.R. 12). Subsequently, on July 13, 1992, Appellant pleaded guilty to the charge of failure to appear (2 R. 8-10). On October 2, 1992; appellant was sentenced to 120 months' imprisonment, three years' supervised release, and a $50.00 special assessment for the aviation smuggling offense (1 R. 5-8). Immediately after sentencing for the above offense, the district court sentenced Appellant to a 15 month consecutive term of imprisonment, a concurrent two year term of supervised release, and a $50 special assessment for the failure to appear offense (2 R. 5-8 (V.T. 10/02/92 11:39:23-11:42:28). Appellant filed notice of appeal

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[1] References to the Record on Appeal are designated by the number of the record volume assigned by the Clerk of this Court followed by "R." and the pertinent page number(s). References to the Presentence Investigation Report are designated "PSI" followed by the relevant paragraph number(s). Exhibits are referenced "GX" for government exhibits and "DX" for defendant exhibits followed by the exhibit number assigned in the district court.

B. Statement of Facts

On appeal, Appellant does no challenge the sufficiency of the evidence and the facts are not in dispute. The facts developed at sentencing establish that in early November 1988, an organization headed by Juan Magnone initiated a conspiracy to smuggle marijuana into the United States via aircraft (PSI paragraph 6). Magnone's co-conspirators during this period were identified as Rudy Berrones, Antonio Hernandez, and Appellant Mitchell (PSI paragraph 7). In December 1988, the organization purchased a Piper Cherokee Six aircraft (id.). The pilot of this aircraft was later identified as Briane E. Tillley (id.). With the help of an undercover police officer who had infiltrated the organization, an airstrip was located near Uvalde, Texas, and arrangements were made for the covert use of the airstrip by the Magnone organization (id.).

On January 21, 1989, the undercover officer informed U.S. Customs agents that the aircraft was to go to Mexico to pick up marijuana the following day (PSI paragraph 8). On January 22, 1989, surveillance was established at the airstrip and the aircraft was observed landing shortly after 9:00 a.m. (id.). The aircraft departed a short time later loaded with five gallon cans of aircraft fuel for re-fueling in Mexico. At approximately 5:30 p.m. the aircraft returned to the airstrip (id.). The pilot, the undercover officer, and three other persons were observed unloading bundles from the aircraft (id.). As officers moved in to effect the arrest, the pilot fled back to Mexico in the aircraft (PSI paragraph 9). Three suspects, identified as Antonio Hernandez, Ricardo Garza, and Steven McGowan were arrested as they attempted to flee from the off-load site (id.) Approximately 540 pounds of marijuana, a 1978 Ford tractor/trailer intended to use in transporting the marijuana,

and a 1980 Buick used to facilitate the unlawful importation of the marijuana were seized at the airstrip (id.). A 1984 Toyota pickup used in the facilitation of the offense was later seized in addition to $4,500 in United States currency taken from James Mitchell (id.). Mitchell was arrested at a local motel and admitted that he had returned to bail co-defendant McGowan out of jail (id.). Mitchell advised officers that McGowan worked for him and that the 1978 Ford tractor/trailer belonged to him (id.). Mitchell was as one of the owners of J&J Enterprises, the owner of the truck (id.). Further, Appellant admitted that he helped the organization obtain the pilot for the smuggling operation.

SUMMARY OF THE ARGUMENT

The district court properly determined Appellant's sentence. The district court, pursuant to U.S.S.G. Section 3C1.1, adjusted appellant's base offense level for obstruction of justice resulting from Appellant's failure to appear for sentencing following his conviction for aiding and abetting aviation smuggling. Thereafter, the district court assessed a 15 month consecutive sentence for the failure to appear offense as mandated by 18 U.S.C. Section 3146. The district court did no clearly err in determining Appellant's sentence.

ARGUMENT AND AUTHORITIES

By two issues, Appellant challenges the guideline based sentences he received for the offenses of aiding and abetting aviation smuggling and failure to appear. Both complaints are without merit and misapprehend the operation of the applicable Guideline and statutory provisions in this case.

1. Background

Appellant pleaded guilty to the offense of aiding and abetting aviation smuggling. Appellant was released on bond pending sentencing and failed to appear until being apprehended approximately two years later in Las Vegas, Nevada. On October 2,1992, Appellant was sentenced to 120 months' imprisonment. This sentence included a two level obstruction of justice adjustment for his failure to appear for sentencing. Thereafter, appellant also pleaded guilty for the offense of failure to appear. Appellant was assessed a 15 month consecutive sentence for this offense.

2. Obstruction of Justice

By his first issue, Appellant argues that the district court clearly erred when it allegedly "twice assessed punishment" in violation of the double jeopardy clause by assessing a two level increase for obstruction of justice (underlying offense) and assessing a 15 month consecutive sentence for the failure to appear offense. It is well settled that Guideline section 3C1.1 permits the trial judge to adjust the offense level for obstructive conduct. The adjustment applies to willfully failing to appear for a judicial proceeding. U.S.S.G. Section 3C1.1, comment. (n.6). However, if a defendant is convicted of an obstruction offenses as well as an underlying offense, the counts should be grouped. Guideline Section 3D1.2 specifies that counts involving "substantially the same harm" should be consolidated. Counts involve substantially the same harm "(w)hen one of the counts embodies conduct that is treated as a specific offense characteristic in. or other adjustment to, the guideline applicable to another of the counts." U.S.S.G. Section 3D1.2(c). Application Note 5 to that section explains:

> Subsection (c) provides that when conduct that represents a separate count, e.g., bodily injury or obstruction of justice, is also a specific offense characteristic in or other adjustment to another count, the count represented by that conduct is to be grouped with the count to which it constitutes an aggravating factor. This provision prevents "double counting" of offense behavior.... (A) count such as obstruction of justice, which represents a Chapter Three adjustment and involves a different harm or societal interest than the underlying offense, is covered by subsection (c).

U.S.S.G. Section 3D1.2, comment. (n.5).

Thus, as these Guidelines make clear, if the court enhances an offense level for an underlying offense due to behavior included in the obstruction offense, the court must group the offenses. See ***United States v. Connor***, 950 F.2d 1267, 1276 n. 5 (7th Cir. 1991); ***United States v. Williams***, 935 F.2d 1531, 1539 (8th Cir.), cert. denied, ____ U.S. ____, 112 S.Ct. 1189 (1991); ***United States v. Hankins***, 931 F.2d 1256, 1265 (8th Cir.), cert. denied, ____ U.S. ____, 112 S.Ct. 243 (1991). The Court must then determine the appropriate sentence using the greater of either the enhanced offense level for the underlying offense or the obstruction offense.

This analysis equally follows when a defendant is convicted in separate trials (or in this case separate pleas) of two crimes that would be grouped if they had been consolidated in a single trial; hence, the trial court should

impose a total sentence commensurate with that which the defendant would have received had the offenses been grouped at a single trial. ***United States v. Lechuga***, 975 F.2d 397, 400-401. (7th Cir. 1992). This procedure accords with the sentencing guidelines' purpose "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. Section 3553. Thus in the second trial, the district court must impose a total sentence equal to that which would have been imposed in a single trial. See U.S.S.G. Section 5G1.3(b) and commentary.

When a defendant has been convicted of an underlying offense and a failure to appear offense at a single trial, the Application notes to the guidelines explicitly provide that those offenses should be grouped for sentencing. Application Note 3 to Section 2J1.6 to the November 1, 1991, guidelines provides that "in the case of a conviction on both the underlying offense and the failure to appear, the failure to appear is treated under Section 3C1.1 (Obstructing or Impeding the Administration of Justice) as an obstruction of the underlying offense; and the failure to appear count and the count(s) for the underlying offenses are grouped together under Section 3D1.2(c)." See also Application Note 6 to Section 3C1.1. Application Note 6 to Section 3C1.1 of the November 1990 guidelines states:

> Where the defendant is convicted of both the obstruction offense and the underlying offense, the count for the obstruction offense, the count for the obstruction offense will be grouped with the counts for the underlying offense under subsection (c) of Section 3D1.2 (Groups of Closely-Related

> Counts). The offense level for that group of closely-related counts will be the offense level for the underlying increased by the 2-level adjustment specified by this section, or the offense level for the obstruction offense, whichever is greater.

Under those Application Notes, if Appellant had been convicted of both offenses during one trial, the failure to appear offense (Case No. DR-89-54-CR; 92-8616) would have been treated as an "obstruction" of the underlying drug offenses (Case No. DR-89-CR-08; 92-8615). This grouping would result in a two-level enhancement for the obstruction offense. When added tot he defendant's base offense level of 28 (including a two point leadership adjustment) for the aviation smuggling offense, that enhancement yielded a Level 30 offense, and a sentencing range of 108 to 135 months' imprisonment.[2] In this case then, the total sentence imposed on Appellant for the underlying offenses and the obstruction offense may not exceed 135 months absent grounds for upward departure.

As applied to the instant case, the district court sentenced Appellant to a 120 month term of imprisonment on the underlying drug offense –well within the maximum Guideline sentence of 135 months. With this maximum in mind, the district court then (immediately following the first sentence) assessed a consecutive 15 month sentence for the failure to appear offense for a total punishment term of 135 months. The two sentences in essence effectuate the "grouping" requirements set forth above and also comply with 18 U.S.C.

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[2] Appellant's criminal history category (category II) was not adjusted for the failure to appear offense. Compare Lechuga, 975 F.2d at 400.

Section 1346 which mandates that the sentence for failing to appear "shall be consecutive to the sentence of imprisonment for any other offense." Thus, the district court properly determined Appellant's sentence in accordance with the guidelines.

By his second issue, Appellant argues that the district court clearly erred in determining that 19 U.S.C. Section 1590, aviation smuggling, has a statutory maximum sentence of twenty years' imprisonment. Appellant maintains that under 18 U.S.C. Section 3581, the above offense should have an authorized term of imprisonment of not more than twelve years.[3] This argument is without merit.

19 U.S.C. Section 1590(d)(2) specifically provides that if the aviation offense involved a controlled substance, then the maximum term of imprisonment is 20 years. Appellant attempts to circumvent this language by referring to 18 U.S.C. Section 3581 which provides that a class "C" felony has a maximum term of imprisonment of 12 years (relying upon 18 U.S.C. Section 3559(a)(3) which provides that an offense that is not specifically classified by a letter grade and has a maximum sentence of less that 25 years' imprisonment is a class "C" felony). Appellant ignores, however, 18 U.S.C. Section 3559(b) which further provides that "an offense classified under subsection (1) carries all the incidents assigned to the applicable letter designation, except that the maximum term of imprisonment is the term authorized by the law describing the offense." Thus, the maximum term of

[3] The basis for this argument is that U.S.S.G. Section 2J1.6 provides for a base offense level of six and a nine point specific offense characteristic adjustment if the underlying offense is punishable to a term of imprisonment of fifteen years or more. Here, the district court increased the offense level by nine points.

imprisonment for a 19 U.S.C. Section 1590 offense involving controlled substances is 20 years as set forth in the statute describing the offense.

Moreover, as set forth above in response to Appellant's first issue, applying the principales of grouping, the Guideline Range for the Grouped offenses was 108-135 months' imprisonment. Hence, any error in the calculation of the offense level, whether it be 15 or 12, would be harmless[4] in light of the grouping provisions applicable to the analysis in this case.

CONCLUSION

For the foregoing reasons, Appellant James B. Mitchell's sentences should be affirmed.

Respectfully submitted,

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[4] This Court is not required to remand the case for resentencing if it finds that the error was harmless. ***Williams v. United States***, ____ U.S. ___, 112 S.Ct. 1112, 1120-21 (1992) (appellate court is not required to remand for resentencing after deciding that district court misapplied the sentencing guidelines if the appellate court concludes the error was harmless); ***United Stats v. Salazar***, 961 F.2d 62 (5th Cir. 1992).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief for the United States of America has been mailed to Mr. Ronald P. Guyer, Attorney at Law, 442 Dwyer Ave., San Antonio, Texas 78204 on this the 6th day of July, 1993.

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